

No. 14727

United States
Court of Appeals
for the Ninth Circuit

EVA ROSE BOLING,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

AUG 31 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Oakland, California,

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Oakland, California,

Attorneys for Plaintiff and Appellant.

LLOYD H. BURKE,
United States Attorney,

FREDERICK J. WOELFLEN,
Assistant United States Attorney,
Post Office Building,
San Francisco, California,

Attorneys for Defendant and Appellee.

In the District Court of the United States, North-
ern District of California, Southern Division

No. 30,764

EVA ROSE BOLING, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

DOCKET ENTRIES

1951

July 31—Filed complaint—issued summons.

Aug. 3—Filed summons, executed Aug. 2, 1951.

Sept. 14—Filed First Amended Complaint for Dam-
ages.

Sept. 25—Issued subpoena d. t. behalf plttf. for
depn.

Nov. 19—Filed answer of defendant.

Nov. 30—Filed notice by plttf. of motion to set for
trial, Dec. 10, 1951, with cert. of readi-
ness.

Dec. 10—Ord. for trial Feb. 28, 1952 (Carter).

1952

Feb. 21—Ord. con'td. to April 30, 1952, for trial
(Carter).

Apr. 25—Ord. cont'd. to May 26, 1952, for trial
(Goodman).

May 26—Ord. cont'd. to May 28, 1952, for trial
(Goodman).

May 28—Ord. cont'd. to May 29, 1952, for trial
(Goodman).

1952

May 29—Ord. cont'd. to June 23, 1952, to be re-set (Goodman).

Jun. 23—Ord. motion to set off cal. (Goodman).

Aug. 11—Filed notice by plttf. of motion to set for trial Aug. 25, 1952, with cert. of readiness.

Aug. 25—Ord. for trial Sept. 24, 1952 (Roche).

Sept. 24—Ord. cont'd. to Jan. 7, 1953, for trial (Roche).

1953

Jan. 6—Ord. off trial cal. Jan. 7, 1953 (Harris).

May 27—Mailed notice dism. June 3, 1953.

Jun. 3—Ord. on motion deft. case dism. (Murphy)

1954

Jun. 1—Ord. after exparte hearing petitioner 1 week to employ counsel and move to vacate order dism. (Harris).

Jun. 4—Ord. on exparte motion of counsel for petitioner, granted 30 days to file formal motion to vacate dismissal (Harris).

Jun. 22—Filed substitution of Severson, McCallum & Davis as counsel for plaintiff.

Jun. 22—Filed substitution of Ralph L. Baker as counsel for plaintiff.

July 2—Filed notice and motion by plaintiff to vacate order of dismissal, July 12, 1954, at 9:30 a.m.

July 12—Ord. after hearing motion to vacate order of dismissal granted and case reinstated to calendar (Hamlin).

July 15—Filed ord. vacating order of dismissal and reinstating case to calendar (Hamlin).

1954

Aug. 3—Filed notice and motion by plaintiff to set for trial, Aug. 9, 1954, with cert. of readiness.

Aug. 6—Filed opposition of plaintiff to motion to vacate order of dismissal.

Aug. 9—Ord. motion to set con'td. to Aug. 16, 1954 (Murphy).

Aug. 19—Filed interrogs. by plaintiff to defendant.

Aug. 23—Filed interrogs by deft. to plaintiff.

Aug. 25—Filed association of J. Adrian Palmquist as atty. for plaintiff.

Oct. 28—Filed answer of defendant to interrogs. by plaintiff.

Nov. 12—Filed notice by plaintiff of taking deposition of Clark McCoy and issued Subp.

Dec. 10—Filed notice and motion by plaintiff to set for trial, Dec. 20, 1954, with cert. of readiness.

Dec. 20—Filed affidavit of Frederick J. Woelflen in opposition to motion to set for trial.

Dec. 20—Ord. motion to set for trial cont'd. to Jan. 24, 1955 (Goodman).

Dec. 22—Filed notice and motion by defendant to dismiss or vacate order reinstating case for trial, Dec. 27, 1954, with order shortening time for service (Goodman).

Dec. 22—Filed affidavit of Frederick J. Woelflen in support of motion.

Dec. 27—Ord. after hearing motion to dismiss for lack of prosecution subm. (Goodman).

1954

Dec. 29—Filed order granting motion of defendant to dismiss for lack of prosecution. Counsel to prepare and present order (Goodman).

Dec. 29—Mailed copies order to counsel.

Dec. 30—Filed order dismissing complaint with prejudice. (Microfilmed.) (Goodman).

Dec. 31—Mailed copies order to counsel.

1955

Jan. 5—Filed deposition of Clark McCoy.

Jan. 14—Filed amendment to order granting motion of defendant to dismiss for lack of prosecution (Goodman).

Jan. 17—Mailed copies order to counsel.

Feb. 17—Filed notice by plaintiff of motion to vacate order of dismissal and for reinstatement of cause to trial calendar, Feb. 23, 1955, before Judge Goodman.

Feb. 18—Filed memo. of deft. in opposition to motion to vacate order of dismissal.

Feb. 18—Filed answer of plaintiff to interrogs. by deft.

Feb. 23—Ord. after hearing motion to vacate order of dismissal denied (Goodman).

Feb. 25—Filed notice of appeal by plaintiff.

Feb. 28—Mailed notices.

Mar. 1—Filed order denying motion of plaintiff to vacate order of dismissal (Goodman).

Mar. 2—Mailed notices or order to counsel.

Mar. 7—Filed appeal bond in sum \$250.00.

1955

Mar. 25—Filed appellant's designation of record on appeal.

Mar. 28—Filed appellee's designation of record on appeal.

Apr. 6—Prepared and docketed record on appeal.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The Plaintiff, Eva Rose Boling, hereby substitutes Severson, McCallum and Davis as her attorneys in the above-entitled action in the place and stead of Hildebrand, Bills and McLeod.

Dated: This 23 day of April, 1954.

/s/ EVA ROSE BOLING

I hereby consent to the above substitution.

Dated: This 30 day of April, 1954.

/s/ HILDEBRAND, BILLS & McLEOD

We hereby accept the above substitution.

Dated: This 30th day of April, 1954.

SEVERSON, McCALLUM & DAVIS

/s/ By JAMES B. WERSON

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 1st day of June, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable George B. Harris, District Judge.

This case came on this day *ex parte*. The plaintiff, Eva Rose Boling was present in Court without attorney. After hearing a statement by Mrs. Boling, the Court advised her to obtain the services of an attorney toward restoring this case, which had been dismissed on June 3, 1953, for want of prosecution, to the calendar. The Court allowed plaintiff one (1) week within which to accomplish this.

A True Copy, Attest:

[Seal]

C. W. CALBREATH,
Clerk

/s/ By WM. C. ROBB,
Deputy Clerk

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Friday, the 4th day of June, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable George B. Harris, District Judge.

N. Tashjian, Esq., advised the Court that he and Ralph L. Baker, Esq., had been retained by the plaintiff to move the Court to restore this case to the calendar. Accordingly, Mr. Tashjian's request for thirty (30) days within which to prepare and present a formal motion to that end is Ordered Granted.

A True Copy, Attest:

[Seal]

C. W. CALBREATH,
Clerk

/s/ By WM. C. ROBB,
Deputy Clerk

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The Plaintiff, Eva Rose Boling hereby substitutes Ralph L. Baker as her Attorney in the above entitled action in the place and stead of Severson, McCallum and Davis.

Dated this 10 day of June, 1954.

/s/ EVA ROSE BOLING

I hereby consent to the above substitution.

Dated this 11th day of June, 1954.

SEVERSON, McCALLUM & DAVIS

/s/ By JAMES B. WERSON

I hereby accept above substitution of attorney.

Dated this 13th day of June, 1954.

/s/ RALPH L. BAKER

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO VACATE ORDER
OF DISMISSAL AND TO REVIVE ACTION

To the Defendant above named and to Lloyd Burke,
United States Attorney:

You and each of you will please take notice that on Monday, the 12th day of July, 1954, at the hour of 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, plaintiff will move the above entitled Court to vacate order of dismissal and to revive action in the above stated cause.

Dated: June 30, 1954.

RALPH L. BAKER,
/s/ By NUBAR TASHJIAN,
Attorney for Plaintiff

MOTION TO VACATE ORDER OF DIS-
MISSAL AND TO REVIVE ACTION

The plaintiff moves the Court to vacate and set aside its order dated the 3rd day of June, 1953, in the above stated action and to revive the same on the grounds of plaintiff's mistake, inadvertence, excusable neglect and for other reasons as more fully appears in the affidavits of James B. Werson and Eva Rose Boling, hereto annexed as Exhibits "A" and "B" respectively.

Dated: The 30th day of June, 1954.

RALPH L. BAKER,
/s/ By NUBAR TASHJIAN,
Attorney for Plaintiff

EXHIBIT "A"

AFFIDAVIT IN SUPPORT OF MOTION TO
VACATE ORDER OF DISMISSAL AND
TO REVIVE ACTION

County of San Francisco,
State of California—ss.

James B. Werson, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice in the State of California, and I am a member of the Law Firm of Severson, McCallum & Davis of San Francisco, California.

2. On or about April 30, 1954 we agreed with Eva Rose Boling, Plaintiff herein that we would represent her in the above-entitled cause upon certain terms and conditions to which she agreed, that said terms and conditions were not performed on the part of Eva Rose Boling.

3. That on May 19, 1954 we learned for the first time, that on or about the 27th day of May, 1953 the Defendant above named moved to dismiss the above entitled cause; we are informed and believe that notice of said motion had been sent to Messrs. Hildebrand, Bills & McLeod, attorneys of record for Plaintiff above named, and that a dismissal of said action had been entered on or about the 3rd day of June, 1953 without opposition.

4. On May 20, 1954 we addressed a letter to Plaintiff advising her of the entry of the order of dismissal and the time within which to move to set aside said order of dismissal, and after point-

ing out that the terms and conditions previously agreed to had not been met, requested that she obtain other counsel.

/s/ JAMES B. WERSON

Subscribed and sworn to before me this 30th day of June, 1954.

[Seal] /s/ AGNES WESTRA,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT "B"

AFFIDAVIT IN SUPPORT OF MOTION TO
VACATE ORDER OR DISMISSAL AND
TO REVIVE ACTION

County of Alameda,
State of California—ss.

Eva Rose Boling, being duly sworn, deposes and says:

1. That she is the plaintiff in the above stated action.

2. That until March, 1953, the firm of Hildebrand, Bills & McLeod were her attorneys in the above stated action, and during that month and year she attempted to substitute the law firm of Severson, McCallum & Davis in the above stated action but that it was not until April, 1954 that the substitution formally took place.

3. That the above entitled action had been set for trial in January, 1953, but upon request of the

government the parties to the above entitled action stipulated to a postponement of trial to an indefinite date.

4. That she did not receive a notice of the motion to dismiss the above entitled action for lack of prosecution nor did she have any knowledge of it.

5. That she did not learn of the order dismissing the above stated action for want of prosecution until May, 1954.

6. That she was effectively without counsel from March, 1953 until April, 1954, when the substitution of Severson, McCallum & Davis was effected.

7. That she is informed and upon that information states that the firm of Severson, McCallum & Davis, though in possession of the files in the above stated action, had no knowledge of the motion and order dismissing the above stated action for want of prosecution until May, 1954, or means of ascertaining it from the files in their possession.

8. That for good reason she discharged Severson, McCallum & Davis as her attorneys in the above stated action in May, 1954, and effected the substitution of Ralph L. Baker, Esq., as her attorney in the above matter in June, 1954.

9. That during the period from March, 1953, through May, 1954, she was engaged in a business that required protracted absences from the City of San Francisco so that she was unable to properly engage counsel in the above stated action.

/s/ EVA ROSE BOLING

Subscribed and sworn to before me this 24th day of June, 1954.

[Seal] /s/ RALPH L. BAKER,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

ORDER VACATING ORDER OF DISMISSAL

Plaintiff's motion in this cause to vacate and set aside order of dismissal for lack of prosecution having come on for hearing this 12th day of July, 1954, and after argument of counsel, it is this 12th day of July, 1954,

Ordered, that the order of this court dated June 3, 1953, dismissing without prejudice the above stated action for lack of prosecution, be and the same is hereby vacated and set aside, and the said action be and it is hereby revived. It is

Further Ordered, that this action be not placed on the trial calendar until further order of this court or upon request of either party.

/s/ O. D. HAMLIN,
Judge, United States District Court

[Endorsed]: Filed July 15, 1954.

[Title of District Court and Cause.]

OPPOSITION TO MOTION TO VACATE ORDER OF DISMISSAL

The defendant above named opposes the motion to vacate the order of dismissal of the above action on the following grounds:

1. That the said motion is made, although not so stated, under the provisions of Rule 60(b)(1) of Federal Rules of Civil Procedure. Said Rule 60(b) further provides that "the motion shall be made within a reasonable time and for reasons (1), (2), (3), not more than one year after the judgment order or proceeding was entered or taken". The action was ordered dismissed on the 3rd day of June, 1953; the motion to vacate was filed July 2, 1954 and was received by the office of the United States Attorney on July 6, 1954. Rule 6(b) provides that the court "may not extend the time for taking any action under Rules * * * 60(b) except * * * to the extent and under the conditions stated in them".

The motion having been filed over a year after the order dismissing the action, the Court has no jurisdiction to entertain the motion in that it was not timely filed.

2. That the motion and affidavits in support thereof fail to state facts sufficient to support the conclusion that there was mistake, inadvertence, surprise or excusable neglect. (See Exhibit "A" attached hereto).

Dated: July 12, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney

EXHIBIT "A"

AFFIDAVIT OF CHARLES ELMER COLLETT
IN SUPPORT OF OPPOSITION TO MO-
TION TO VACATE ORDER OF DIS-
MISSAL

City and County of San Francisco,
State of California—ss.

Charles Elmer Collett, being first duly sworn, de-
poses and says:

That he is an Assistant United States Attorney;
that the complaint in the above action was filed on
July 31, 1951 and was assigned to Rudolph Scholz,
then an Assistant United States Attorney; an
amended complaint was filed September 14, 1951,
and on November 19, 1951 an answer was filed.

That on December 10, 1951, on motion of the
plaintiff, the case was set for trial on February 28,
1952; on February 21, 1952, upon the motion of
Mr. Scholz, trial date was continued to April 30,
1952; prior to April 30th Mr. Scholz resigned as
Assistant United States Attorney and on April 25,
1952 a second motion to continue the trial date was
made by affiant in order to permit reassignment of
the case; trial date was continued to May 26, 1952.
On May 26, 1952 there was no courtroom available
and the case was continued to May 28, 1952; on

May 28, 1952 it was again continued by the Court to May 29, 1952; on May 29, 1952 affiant, together with the witnesses of the defense appeared in court, ready to go to trial; upon the representation of plaintiff's attorney the case was continued to June 23, 1952 to be reset. The representation was made to the Court that counsel had become aware of facts in the case which required further investigation and that until such investigation had been completed he was not prepared to go to trial.

On June 23, 1952 no one appeared on behalf of the plaintiff and the case was dropped from the calendar. On August 4, 1952 a new motion to set the case for trial was filed and on August 26, 1952 the case was set for trial on September 24, 1952. The case appeared on the calendar on September 24, 1952 for trial at 10:00 a.m.; affiant appeared in court at 10:00 a.m., with witnesses in behalf of the defense, prepared to go to trial, and discovered that at some time prior to 10:00 a.m., the attorney appearing in behalf of the plaintiff had requested a continuance, that the Court had granted such continuance to January 7, 1953. Affiant was informed that counsel in behalf of plaintiff had failed to inform the Court of the previous history of the case or that the office of the United States Attorney had not been notified that plaintiff would not be ready to go to trial. Affiant was also informed that the plaintiff was away on an extended vacation and that her counsel was unaware of her whereabouts.

On January 6, 1953 no one appeared in behalf of the plaintiff and the case was ordered off the

trial calendar.

On May 23, 1953 notice that the case was on the dismissal calendar for June 3, 1953 was mailed to plaintiff's counsel by the Clerk of the Court. On June 3, 1953 when the case was called no one appeared in behalf of the plaintiff and the case was dismissed by the Court on motion of the defendant.

The docket discloses that on April 30, 1954 a substitution of attorneys was filed substituting the law firm of Severson, McCallum & Davis, for Hildebrand, Bills and McLeod. Notice of this substitution was not received by the United States Attorney. In June of 1954 plaintiff substituted Ralph L. Baker, Esq., as her attorney in place of Severson, McCallum and Davis.

Affiant states that on May 29, 1952 and on September 24, 1952 affiant had called witnesses and was ready to proceed to trial; that said witnesses were then members of the armed forces of the United States; that said witnesses have since completed their respective tours of duty and their present whereabouts are unknown; that it will be with great difficulty that said witnesses can be located and made available for trial.

/s/ CHARLES ELMER COLLETT,

Subscribed and sworn to before me this 12th day of July, 1954.

[Seal] /s/ MARGARET P. BLAIR,
Clerk U. S. District Court, Northern District of
California.

[Endorsed]: Filed August 6, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION TO SET CAUSE FOR TRIAL, AND IN SUPPORT OF ORAL MOTION FOR CONTINUANCE OF SETTING FOR 30 DAYS

United States of America,
Northern District of California—ss.

Frederick J. Woelflen, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California and is assigned to the defense of the above-captioned matter.

The plaintiff Eva Rose Boling having noticed before this Court her motion to set this cause for trial, affiant executes this affidavit in opposition to the setting of the cause for trial, on the grounds that the certificate of readiness accompanying said notice of motion represents to the Court that all pre-trial discovery procedures have been concluded and this matter is presently capable of proceeding to trial before this Court. Affiant alleges that not all pre-trial procedure, depositions and physical examinations have been completed, and that this matter is not in a position to be tried.

Affiant calls to the Court's attention certain facts concerning this litigation as set forth in an affidavit executed by Charles Elmer Collett, Assistant United States Attorney, on July 12, 1954, now on file in the record of these proceedings, said affidavit hav-

ing been filed in opposition to plaintiff's prior motion to vacate an order of dismissal of said action for lack of prosecution. Affiant represents to the Court that on June 3, 1953, plaintiff's complaint and cause of action was dismissed by this Court for lack of prosecution; that said action was originally instituted on July 1, 1951; that the docket on file with the Clerk of the United States District Court, Northern District of California, discloses that between July 31, 1951, and June 3, 1953, the trial date of said cause was continued on eight occasions; that on September 24, 1952, this matter was set for trial; that the defendant was ready, willing and able to proceed to trial on that date; that on that date plaintiff's counsel appeared in court prior to the hour set for trial, and in the absence of a representative of the United States Attorney obtained a continuance of said trial.

Affiant represents that upon said complaint being dismissed by the above-entitled Court on June 3, 1953, affiant advised the Department of Justice and the Department of the Air Force of said dismissal; and the Office of the United States Attorney for the Northern District of California, as well as the Department of the Air Force and the Department of Justice, Washington, D. C., closed their files on this litigation; that the effect of said dismissal was to release any holds that the Department of the Air Force might have on government witnesses; that thereafter government witnesses Charles A. Jones, the driver of the government vehicle, and Staff Sergeant Marvin R. Saxton and

Captain William H. Boulineau, who investigated the accident in question in this litigation and interviewed the plaintiff following the accident, were discharged from the military service or transferred to assignments outside the State of California; that this matter was ordered restored to the trial calendar by Judge O. D. Hamlin on July 12, 1954, after a motion had been made by plaintiff's counsel to vacate the order of dismissal of June 3, 1953. Plaintiff's written motion was not made until July 2, 1954—thirteen months after the Court's dismissal of June 3, 1953. Affiant alleges that since this matter was restored to the trial calendar on July 12, 1954, he has been continuously engaged in an attempt to obtain information regarding the present whereabouts of Charles A. Jones, the driver of the government vehicle, and likewise to ascertain the present duty stations of Staff Sergeant Marvin R. Saxton and Captain William H. Boulineau, the military personnel who investigated the accident for the Department of the Air Force. Affiant has only recently located the driver of the government vehicle, and affiant was advised by said witness on December 13, 1954, that it would not be convenient to him to have his deposition taken on oral interrogatories until after the end of the current calendar year, as said witness is presently attending school in an area of the State of Louisiana remote from the office of any United States Attorney; and said witness has requested affiant to delay the taking of his deposition until after January 1, 1955, when he will have returned to his home in Natchez,

Mississippi. To date affiant has been unable to obtain any information regarding the present whereabouts of said Staff Sergeant Saxton and said Captain Boulineau.

Affiant further states to the Court that on October 7, 1954, plaintiff submitted to a deposition on oral interrogatories conducted by affiant; that at the conclusion of said deposition affiant requested that plaintiff submit to a further physical examination (plaintiff originally having submitted to such an examination at the United States Air Force Hospital at Hamilton Air Force Base in January and February of 1952, and affiant having been informed that the doctors who conducted said physical examination of plaintiff are no longer in the service of the Department of the Air Force and not available to testify at the trial of this matter). Affiant verily believes that in view of the lapse of time between the date of the accident of October 11, 1950, and the last time plaintiff was examined by the defendant's doctors, on February 12, 1952, a further examination of plaintiff's physical condition is necessary in order to properly defend this trial. Since October 7, 1954, plaintiff has been continuously absent from the State of California and has been unable to submit to such a physical examination; and on October 7, 1954 (the occasion of the taking of her deposition, plaintiff had indicated her unwillingness to submit to any further physical examination. Plaintiff's counsel, Mr. Ralph Baker, has informed affiant that plaintiff would be willing to submit to a physical examination a few days

prior to the date on which this matter should be set for trial.

Affiant verily alleges that such physical examination of plaintiff would, by regulations of the Department of Justice, have to be conducted at the United States Public Health Service Hospital in San Francisco, California. Affiant respectfully represents that, inasmuch as the medical staff of the said hospital is required to give priority attention to large numbers of patients who are regularly entitled to the facilities of the hospital, under the laws of the United States, it would be extremely difficult for said doctors to conduct a physical examination of plaintiff two to three days prior to trial, complete the laboratory tests and x-ray films, consolidate the clinical findings from all procedures carried out in such an examination, and dictate the final report so as to have complete medical data in the possession of affiant in sufficient time for affiant to adequately prepare the medical phase of this litigation.

Affiant respectfully submits that this matter is not presently in a position to be set for trial; that further depositions will be required; that it will be necessary for the plaintiff to submit to a physical examination at least two weeks prior to the date of trial.

In view of the foregoing, It Is Respectfully Requested that the plaintiff's motion to set this cause of action for trial be continued for a period of not less than thirty days, in order to give the defendant United States of America sufficient opportu-

ity to take the depositions of its witnesses who are presently outside the State of California, and to allow adequate time for plaintiff Eva Rose Boling to submit to a further physical examination to be conducted by the defendant's doctors.

Dated: December 20, 1954.

/s/ FREDERICK J. WOELFLEN,
Asst. United States Attorney

Subscribed and sworn to before me this 20th day of December, 1954.

[Seal] /s/ MARGARET P. BLAIR,
Deputy Clerk, United States District Court for the
Northern District of California.

[Endorsed]: Filed December 20, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER OF DIS-
MISSAL OF CAUSE FOR LACK OF PROS-
ECUTION, OR IN THE ALTERNATIVE,
FOR ORDER VACATING ORDER RE-IN-
STATING CAUSE FOR TRIAL

To the Plaintiff above named, and her attorneys:
Ralph L. Baker, 715 Easton Bldg., Oakland 12,
Calif.; J. Adrian Palmquist, 505 Central Bank
Bldg., Oakland 12, Calif.; Nubar Tashjian,
Phelan Bldg., San Francisco, Calif.:

You and each of you will please take notice that
on Monday, December 27, 1954, at the hour of 9:30

a.m. or as soon thereafter as counsel may be heard, in the court room of Judge Louis E. Goodman, Room 258 Post Office Building, Seventh and Mission Streets, San Francisco, California, the defendant United States of America will move the above-entitled Court, in the alternative, for dismissal of the plaintiff's complaint and cause of action for lack of prosecution thereof, or for an order setting aside and vacating the order of July 12, 1954, rendered by Judge O. D. Hamlin of this Court, setting aside and vacating this Court's order of June 3, 1953, which dismissed said complaint for lack of prosecution.

Said motion will be made upon all the grounds, pleadings and affidavits on file herein,—most particularly, the affidavit of Charles Elmer Collett, Assistant United States Attorney for the Northern District of California, dated July 12, 1952, which affidavit was filed in opposition to plaintiff's motion to vacate the order of dismissal; as well as the affidavits of Eva Rose Boling and James Werson filed on July 2, 1954, in support of plaintiff's motion to vacate the order of dismissal; together with the affidavit of Frederick J. Woelflen appended to this motion, and the defendant's memorandum of points and authorities incorporated herein as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 41(b), Federal Rules of Civil Procedure;
Rule 60(b), *Ibidem*;

Rule 7(a) and 7(b), Amended, Rules of Practice, Northern District of California.

The instant action of plaintiff Eva Rose Boling was instituted under the Federal Tort Claims Act upon her filing of the complaint in the above-entitled Court on June 30, 1951. The complaint alleges that as a result of an accident which occurred on October 18, 1950, she sustained certain personal injuries for which she seeks recovery in the sum of \$75,300. An amended complaint was filed by the plaintiff on September 14, 1951, and thereafter on November 19, 1951, the defendant United States of America filed its answer to said complaint. The Court's attention is invited to the following docket entries on file with the Clerk of the United States District Court, concerning proceedings taken after the issues were joined:

November 30, 1951—Plaintiff moved to set cause for trial;

December 10, 1951—Trial set for February 28, 1952;

February 21, 1952—Trial continued to April 30, 1952;

April 25, 1952—Trial continued to May 26, 1952;

May 26, 1952—Trial continued to May 28, 1952;

May 28, 1952—Trial continued to May 29, 1952;

May 29, 1952—Matter continued to June 23, 1952, to be re-set;

June 23, 1952—Plaintiff's motion for setting of cause for trial placed off calendar by virtue of lack of appearance of plaintiff or her counsel;

August 4, 1952—Plaintiff's motion to set cause for trial filed;

August 26, 1952—Trial of cause set for September 24, 1952;

September 24, 1952—Trial ordered continued to January 27, 1953 (See affidavit of Charles Elmer Collett, at page 1, line 31, to page 2, line 11);

January 6, 1953—Trial placed off calendar;

May 23, 1953—Clerk's notice of motion to dismiss for lack of prosecution, pursuant to provisions of Rule 7(a) and (b), mailed to plaintiff's counsel;

June 3, 1953—Complaint dismissed for lack of prosecution;

July 2, 1954—Motion filed to vacate order of dismissal of June 3, 1953;

July 12, 1954—Order granted vacating dismissal of June 3, 1953.

The effect of the dismissal by the Court on June 3, 1953, amounted to an adjudication of the cause on its merits (Rule 41(b), Federal Rules of Civil Procedure).

The plaintiff's motion of July 2, 1954, to vacate the order of dismissal of June 3, 1953, was not made within the time limitation required by Rule 60(b) of the Federal Rules of Civil Procedure, said Rule 60(b) requiring that a motion to vacate a dismissal must be made within one year after entry of the order or judgment. Inasmuch as plaintiff's motion was made thirteen months after the entry of the order of June 3, 1953, the Court therefore lacked jurisdiction on July 12, 1954, to entertain the plain-

tiff's motion of July 2, 1954, and was without power to vacate or set aside the dismissal of June 3, 1953.

The affidavit of plaintiff Eva Rose Boling in support of her motion to vacate the dismissal of June 3, 1953, clearly shows that she was aware, not later than May of 1954, of the dismissal of her suit on June 3, 1953, and that she was fully cognizant of the posture of her litigation against the government within one year following its dismissal. On May 20, 1953, she was apprised by her counsel that immediate steps should be taken to vacate the dismissal of June 3, 1953 (See affidavit of James Werson filed on June 2, 1954). Despite this knowledge the plaintiff took no immediate steps to protect her rights, but slept on them until formally moving the Court on July 2, 1954, to set aside the previously entered dismissal. The plaintiff's subsequent actions to protect her interests do not obviate the fact that her motion of July 2, 1954, was not made within the time limitation provided by Rule 60(b), above mentioned.

Hicks vs. Bekins Moving and Storage Van Co.,
115 F.2d 406 (9th Cir.);

United States vs. Pacific Fruit & Produce Co.,
138 F.2d 369 (9th Cir.).

It is the contention of the defendant that despite any motion which might be made by the United States for dismissal, the record in this litigation is such that the Court in this litigation has inherent power on its own motion to dismiss the cause for want of prosecution.

Sweeney vs. Anderson, 129 F.2d 756 (10th Cir.) ;
Shotkin vs. Westinghouse Electric & Mfg.
Corp., 169 F.2d 825 (10th Cir.).

It is respectfully submitted, in view of the authorities cited herein and the affidavits on record in this cause, that plaintiff's complaint and cause of action should be dismissed for lack of prosecution; or in the alternative, that the order of this Court dated July 12, 1954, setting aside this Court's prior order of dismissal of plaintiff's complaint for lack of prosecution, made and entered on June 3, 1953, should be set aside and this matter dismissed.

Ackerman vs. United States, 14 F.R.Serv., Par.
60b. 29, Case No. 4,340 U.S. 193.

Dated: December 22, 1954.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney

/s/ By FREDERICK J. WOELFLEN,
Asst. United States Attorney

ORDER SHORTENING TIME

Upon the ex parte application of the defendant United States of America in good cause appearing, It Is Hereby Ordered that service of a copy of the above motion and memorandum of points and authorities in support thereof may be made not later than 5:00 p.m., December 23, 1954, and that service of the above order may be effected by mailing a

copy of said motion and memorandum to the respective counsel for the plaintiff herein.

Dated: December 22, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
ORDER OF DISMISSAL OF CAUSE FOR
LACK OF PROSECUTION, OR IN THE
ALTERNATIVE, FOR ORDER VACATING
ORDER RE-INSTATING CAUSE FOR
TRIAL

United States of America,
Northern District of California—ss.

Frederick J. Woelflen, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California and is the attorney currently assigned to the defense of the above-captioned matter;

That prior to July 12, 1954, the defense of this suit had been handled primarily by Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; that during the month of January 1953 affiant had assisted Mr.

Collett in the preparation of this matter for trial, which had been scheduled for January 7, 1953; that by virtue of affiant's heavy trial schedule during the month of January 1953, said cause was placed off calendar when originally set for trial on January 7, 1953; that thereafter affiant did not personally handle the instant litigation until August of 1954, following the granting of plaintiff's motion to vacate this Court's order of dismissal dated June 3, 1953;

That subsequent to July 12, 1954, affiant in reviewing the file in this litigation and in attempting to prepare this matter for trial, became aware for the first time of the fact that there were no longer available to him any government witnesses who could personally appear at the trial of this cause and assist him in adequately defending plaintiff's suit; and affiant alleges that the absence of such witnesses is occasioned by reason of the fact that after this matter had been dismissed on June 3, 1953, the instant litigation was placed in closed status in the United States Attorney's office in San Francisco, and the Department of Justice in Washington, D. C., and the Department of the Air Force in Washington, D. C., were advised that it was no longer necessary that a hold be placed upon the appropriate government witnesses in order to make them available if this matter should proceed to trial;

That one of the witnesses released as a result of said dismissal of this cause was Charles A. Jones, the driver of the Air Force vehicle involved in this

litigation, and the sole government eyewitness to the accident which gave rise to the instant suit; that at the time this matter was dismissed Mr. Jones was a member of the Air Force and was stationed at Hamilton Air Force Base, Marin County, California, and was readily available for testimony if this matter had proceeded to trial; that subsequent to the dismissal of June 3, 1953, Mr. Jones was discharged from service and returned to his home in Nachez, Mississippi, and since that time has been attending college in Louisiana; that on December 15, 1954, Mr. Jones communicated with affiant, stating that because of the long period of time which has elapsed since the accident of October 18, 1950, he cannot accurately recall any facts surrounding the accident and therefore feels that he can be of no material assistance to the United States in defending this matter in event it should proceed to trial.

Affiant alleges that if this matter does proceed to trial the defendant United States of America will be required to present the testimony of its sole eyewitness to the accident in question, Mr. Jones, by way of deposition, and that the said faultiness of his memory, resulting from the time lapse between October 18, 1950 and the taking of his deposition some time in January of 1955, will not materially aid the defense of this litigation.

Affiant alleges that on October 7, 1954, plaintiff Eva Rose Boling submitted to a deposition taken by affiant and at that time testified that she was

suffering from certain personal injuries resulting from the accident of October 18, 1950, additional to those which she had described to the government doctors who had examined her on January 30, 1952, and on February 12, 1952, at Hamilton Air Force Base Hospital;

That affiant has been informed by the Department of the Air Force that the doctors who examined Mrs. Boling on said occasions are no longer in the military service and therefore cannot be made available to testify if this matter proceeds to trial;

That the Defendant United States of America will be required to incur additional expense in examining Mrs. Boling and that such expense will in no way be occasioned by any lack of diligence on the part of the defendant in preparing this matter for trial, but will be solely occasioned by the lack of diligence on the part of the plaintiff in protecting her interest; that is, by her having allowed the complaint to be dismissed for lack of prosecution.

Affiant alleges that by reason of the lack of witnesses and the lapse of time between the date of the accident and the date of the execution of this affidavit, the interests of the United States of America have been materially jeopardized, so as to prevent a proper presentation of a defense against the claim of *Eva May Boling*.

By reason whereof it is respectfully submitted and urged that the complaint of plaintiff *Eva Rose*

Boling should be dismissed for lack of prosecution and with prejudice.

Dated: December 22, 1954.

Respectfully submitted,

/s/ **FREDERICK J. WOELFLEN**,
Asst. United States Attorney

Subscribed and sworn to before me this 22nd day
of December, 1954.

[Seal] /s/ MARGARET P. BLAIR,
Deputy Clerk, United States District Court for the
Northern District of California.

[Endorsed]: Filed December 22, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 30764

EVA ROSE BOLING, Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER GRANTING MOTION TO DISMISS
FOR FAILURE TO PROSECUTE (Rule
41b FRCP.)

Plaintiff filed a suit under the Federal Tort Claims Act on July 31, 1951, alleging that she had been injured by a government vehicle in an accident claimed to have occurred on October 18, 1950. The answer of the United States of America

was filed on November 19, 1951. Motion to set for trial was filed on November 30, 1951. From that time trial was continued a number of times. On June 3, 1953, pursuant to Rule 7(a) and (b) of the Rules of this Court, the cause was dismissed for lack of prosecution.

On April 23, 1954, plaintiff substituted new attorneys; on June 10, 1954, plaintiff again changed attorneys; on July 2, 1954, the last appointed attorney filed a motion to vacate the order of dismissal of June 3, 1953, pursuant to Rule 60a and b of the FRCP. On July 12, 1954, even though more than a year had elapsed since the dismissal, (see 60b FRCP) the court vacated the order of dismissal of June 3, 1953.

Now before the court is defendant's motion, filed December 22, 1954 pursuant to Rule 41b FRCP, to dismiss the cause for failure of plaintiff to prosecute.

At all times since the cause was at issue the calendar of this court was such that the cause could have been set for trial and promptly tried.

The history of this litigation compels the conclusion that there has been a failure to prosecute the action and that an involuntary dismissal pursuant to Rule 41b FRCP should be adjudged. The policy of the law against the litigation of stale demands is based upon important and vital considerations, one of the most important of which is the great difficulty of doing justice as between litigants upon testimony as to long past events. This case should be governed by that policy.

Accordingly the motion to dismiss for failure to prosecute is granted. Present order accordingly.

Dated: December 29, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge

[Endorsed]: Filed December 29, 1954.

[Title of District Court and Cause.]

**ORDER DISMISSING COMPLAINT AND
CAUSE OF ACTION WITH PREJUDICE**

The motion of the defendant United States of America for an order of dismissal of complaint for lack of prosecution, or in the alternative for an order vacating the order reinstating the cause for trial, came on regularly for hearing on December 27, 1954, the defendant appearing by Lloyd H. Burke, United States Attorney for the Northern District of California, and Frederick J. Woelflen, Assistant United States Attorney, and the plaintiff Eva Rose Boling appearing by and through her counsel Ralph L. Baker, Esq.; and the motions having been argued, and the Court having been apprised of the law and the facts and the premises, and having on December 27, 1954, taken the motions under submission; and thereafter, on December 29, 1954, the Court having filed its order granting the motion to dismiss for failure to prosecute, It Is Hereby Ordered, Adjudged and Decreed that the complaint and cause of action of plaintiff Eva Rose

Boling be and the same is hereby dismissed with prejudice.

Dated: December 30th, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

Certificate of Service attached.

[Endorsed]: Filed December 30, 1954.

[Title of District Court and Cause.]

AMENDMENT TO ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO PROSECUTE

In its order of December 29, 1954, granting defendant's motion to dismiss for failure to prosecute, the Court noted that plaintiff had on July 2, 1954 filed a motion to vacate the order of dismissal of June 3, 1953, and that on July 12, 1954, more than a year following the dismissal, the order of dismissal was vacated. Although the order did not so state, the Court was aware of the fact that on June 1, 1954, within the year following the dismissal of June 3, 1953, the plaintiff had appeared informally ex parte and had been granted one week to secure counsel and move to vacate the order of dismissal, and that on June 4, 1954, counsel for plaintiff appeared ex parte and was granted 30 days to file a formal motion to vacate the dismissal.

The order granting the motion to dismiss was not based upon the fact that the formal motion to

vacate the dismissal was not filed within a year after the dismissal, nor was the order based upon any single factor in this proceeding. Rather, the basis for the order was the conclusion that the entire record of this proceeding shows that there has been a failure to diligently prosecute the action and that the cause has become stale.

Dated: January 14, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from those certain orders and decrees entered in the above entitled action on December 29, 1954 and December 30, 1954 and the amendment thereto filed January 14th, 1955.

February 25, 1955.

/s/ NUBAR TASHJIAN,
Attorney for Plaintiff

[Endorsed]: Filed February 25, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals, or true copies thereof, filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Complaint.

First amended complaint for damages.

Answer.

Substitution of attorneys.

Substitution of attorneys.

Notice of motion to vacate order of dismissal and to revive action with affidavits attached.

Order vacating order of dismissal.

Opposition to motion to vacate order of dismissal with affidavit attached.

Plaintiff's interrogatories.

Defendant's interrogatories.

Answer to plaintiff's interrogatories.

Affidavit in opposition to plaintiff's motion to set cause for trial, and in support of oral motion for continuance of setting for 30 days.

Notice of motion for order of dismissal of cause for lack of prosecution, or in the alternative, for order vacating order re-instating cause for trial.

Affidavit in support of motion for order of dismissal, etc.

Order granting motion to dismiss for failure to prosecute.

Order dismissing complaint and cause of action with prejudice.

Amendment to order granting motion to dismiss for failure to prosecute.

Notice of motion to vacate order dismissing cause for lack of prosecution, and for order re-instating cause for trial.

Answers to interrogatories propounded by United States.

Notice of Appeal.

Order denying plaintiff's motion to vacate order of dismissal.

Designation of record on appeal.

Counterdesignation of record on appeal.

Docket entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of April, 1955.

[Seal] C. W. CALBREATH,

Clerk

/s/ By WM. C. ROBB,

Deputy Clerk

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

ifornia, do hereby certify that the foregoing document, listed below, is the original filed in the above-entitled case, and that it constitutes a part of the record on appeal herein:

Reporter's transcript of motion to vacate order of dismissal in one volume of Monday, July 12, 1954.

Reporter's transcript of motion to dismiss in one volume of Monday, December 27, 1954.

Cost Bond on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 4th day of May, 1955.

[Seal] C. W. CALBREATH,
 Clerk
 /s/ By WM. C. ROBB,
 Deputy Clerk

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Tuesday, June 1, 1954

Before: Hon. George B. Harris, Judge.

Appearances: For the Plaintiff: In Personam;
For the Defendant: None.

Mrs. Boling: I am Eva Rose Boling, plaintiff in case No. 30764 against the United States of America, and I have just received notice that it has been set for dismissal June 3rd through Judge Murphy's dismissal calendar. Notice of dismissal

was sent to Hildebrand, McLeod & Bills, the attorneys that I had before I changed to those other attorneys. Let's see. Their names are Sederson, McCallum & Davis and Mr. Werson has been handling the case since February 10th, 1953, when I hired them.

They wrote me a letter May 10th, 1954 telling me that all this different data; that on February 10th, 1953, at which time I wrote them inquiring if they would handle the case, and the next day Mr. Almon McCallum phoned me in San Bernardino and told me he would take the case; that he wanted it very badly, and he made a phone call instead of writing.

Then on the 16th of March I contacted them again, and on March 24th, 1953 again, and he said that—or he wrote to me, rather, and told me that he had written to Mr. Sheridan Downey who was handling the case at that time requesting him to forward my file to their office—McCallum's office—for the purpose of reviewing it to ascertain whether they would be willing to represent me. And then on March 31st they wrote me again telling me that they reviewed the case and asking me to send details explaining about the accident. And on April 23rd they wrote to me again and asked me to stop in on my way down.

You see, I sell a product I manufacture, Boling's Spot Remover. I sell that to the stores in different towns throughout the United States to introduce it. Then at that time I was up near Canada. So I wrote to him and told him that on the way down I

would stop in to see him, which was in December just before Christmas.

He didn't tell me at that time that—well, he did tell me, rather, that he would take the case the same as Hildebrand, McLeod, and them had agreed to take it, and that was on a 20 percent basis of the amount that I should receive and that I didn't have to pay them until I received that.

And then when I went in to see him in December he said he would take the case in the same manner, and he never mentioned a thing about \$150 costs or \$200 retainer fee, and he said he would take it and all like that.

So I had faith in believing that he was going to handle it.

The Court: May I interrupt a moment? Mr. Welch, this case was dismissed when?

Mr. Welch: Dismissed for lack of prosecution around June 3, 1953.

Mrs. Boling: Yes, June 3rd, and they sent a letter to Mr. Hildebrand, and he didn't send the letter when this Mr. McCallum asked for the papers; he didn't send that letter on when it came in, although he knew that Mr. McCallum had the case.

The Court: Presently, do you have an attorney representing you at all?

Mrs. Boling: No, he said later on—he said it to me in April——

The Court: You had better get a lawyer, madam.

Mrs. Boling: Yes. In April he sent the substitution papers to me—I mean in March he sent the substitution papers to me; that was in 1954——

The Court: Here is what you should do: Have a lawyer prepare a motion to restore the cause to the calendar.

Mrs. Boling: But I don't have time to do that, sir. And he wrote to me on May 27th——

The Court: You haven't time? What is the time element on this, Mr. Welch?

Mrs. Boling: To June 3rd.

Mr. Welch: The case has already been dismissed, Your Honor. She should have counsel present to represent her.

The Court: Can't you have someone to represent you? Haven't you a lawyer at all?

Mrs. Boling: Well, I had him until he said——

The Court: Well, he is out now. He has declared himself out. You must get someone else.

Mrs. Boling: Well, he said that I had to come in before June 1st down here, and he said we had no notice of this hearing at all from the government's attorney or from Mr. Downey. The dismissal was therefore entered without opposition on June 3rd, 1953, and then down here, and they didn't write to me and tell me either. On June 1st—he said the documents must be filed with the Court before June 1st. And then I didn't know a thing about that Mr. McCallum didn't want to take it until just before I came down here Friday. Last Friday I phoned to them and they told me that it was on account of this dismissal they didn't want to take it. And they didn't know a thing about it until they came in to file the papers. Now they hadn't even sent me papers for transfer of attor-

neys until—let's see; that wasn't until April—or, I mean when I was in Georgia. That was March. No, it was April. March 25th is when I phoned to them from Georgia, and they told me they had already sent me a letter, and they had addressed it Edith Boling, and they knew my name was Eva Rose Boling. But they sent me the substitution papers down to Georgia. Well, I didn't know anything about law and I didn't know that that was the first that they had even attempted to transfer a substitution of attorneys. I didn't know a thing about, and they told me when I phoned to them last Friday that they didn't know until they went to file substitution of attorneys that this case was up for dismissal. And so they said that's why they didn't want the case, because it was up for dismissal. And there I am left without anything. And they said it would have to be filed before the first in order to get the dismissal vacated. So I am just at a loss. And I am supporting my family; I have to go around selling through the country and I didn't know that that was the law; they they had to send papers for transfer of attorneys.

Mr. Welch: This is a tort action against the Government filed in 1951.

Mrs. Boling: And the reason I dismissed the first attorney was because he told me that——

The Court: You may have a week to get an attorney to represent you and bring the case in here and have your attorney move to set it back on the calendar, restore it to the calendar.

How many years elapsed? Five years?

Mr. Welch: One year has elapsed.

The Court: It was filed in '51, was it?

Mr. Welch: Yes, it was filed in '51.

The Court: Continue the matter one week until you get a lawyer.

Mrs. Boling: Thank you.

[Endorsed]: Filed May 11, 1955.

[Title of District Court and Cause.]

HEARING ON MOTION TO VACATE ORDER
OF DISMISSAL

Reporter's Transcript, Monday, July 12, 1954
9:30 a.m.

Before: Hon. Oliver D. Hamlin, Judge.

Appearances: For the Plaintiff: Ralph L. Baker, Esq. For the Defendant: Lloyd H. Burke, Esq., United States Attorney, by C. Elmer Collett, Esq., Assistant United States Attorney.

Mr. Collett: If the Court please, before counsel begins I would like to file an objection to the motion to vacate the order and affidavit in support. I have served copy on counsel this morning.

The Court: State the background of the case.

Mr. Baker: If Your Honor please, in this matter an action was filed against the Government, and the original attorneys were the law offices of Hildebrand, Bills & McLeod.

The Court: They were the original attorneys for the plaintiff?

Mr. Baker: That is correct, Your Honor. And Mr. Sheridan Downey, Jr., represented the plaintiff

at that time; then subsequently the law office of Severson, McCallum and Davis were substituted in their stead.

The Court: As attorneys for the plaintiff?

Mr. Baker: That's right.

The Court: All right.

Mr. Baker: And they asked that a certain amount of money be set forth before they continued, and apparently the client wasn't contacted or wasn't able to fulfill that condition, and therefore I was substituted in their stead.

The Court: All right.

Mr. Baker: Now, this has been an unfortunate case. The Government has asked for three continuances on their own behalf, one for resignations and other reasons. Once there was no court room. The last continuance was requested by the Government on January 7, 1953.

Now, subsequent to that time they filed motion to dismiss, and apparently sent the notice to the law office of Hildebrand. Prior to that time——

The Court: What was the basis for the motion to dismiss?

Mr. Baker: We didn't receive a copy of that, and neither did Severson, McCallum & Davis. Hildebrand's office apparently had been dismissed but the substitution was not filed until some time in 1954 and no one appeared on behalf of our office——rather, the office of Hildebrand, Bills & McLeod, and no notice was given the law office of Severson, McCallum & Davis, nor to the plaintiff under Rule 60(b) subsection 1, giving right to obtain relief

from such an order, which in fact was not opposed by anyone and was made the same year when the last continuance was asked by the Government. Plaintiff received no notice whatsoever and the matters therein referred to were dismissed.

Under that same rule we are told the motion shall be made, that is, to obtain relief from the order of dismissal, that motion should be made within one year.

The dismissal took place on June 3rd, 1953. That was the date the matter was dismissed, the case was dismissed, and no one appeared on behalf of the plaintiff on that date.

Now, in the affidavit of Mr. Collett it is stated that no motion was made until after the one year period.

If Your Honor please, there are several bases for granting the relief in this case. First of all, under Rule 60, subdivision (b) (1); and second, under subdivision (6) is "any other reason justifying relief." And, of course the second basis would not require a one-year limitation for making the motion.

However, as a matter of fact, prior to the one-year after June 3rd, 1953, Mrs. Boling herself came to court, on June 1st, 1954, two days before her limitation was up, and asked the court to vacate the dismissal, and at that time she was given one week to obtain an attorney.

Under the case of *Elias vs. Pitucci*, 13 Fed Rules Decisions, page 13, in that particular case the court held the spirit of this one-year rule was complied with when motion was brought to the court's attention at a pre-trial conference. And it is our position

that the motion to vacate was in fact made within one year.

It seems in view of the fact that there is clear liability in the case, and the further fact that she has been made an offer for settlement, she ought to be given her day in court. It seems unquestionable in view of the further fact that the Government asked for a continuance on January 6th, 1953, at which time it was continued to an indefinite date and never set thereafter, and they came in and made a motion to dismiss and the matter was dismissed.

We feel under the circumstances the order for dismissal should be vacated, and we would like to get an early date and clear this matter up because it has been going on for some time.

I might briefly set forth a little history as to how the continuances were made and for what reasons:

On February 21st, 1952, upon motion of Mr. Scholtz the trial date was continued to April 30, 1952. Then Mr. Scholtz resigned, and on April 29, 1952, a second continuance was requested by Mr. Collett in order to permit reassignment of the case. At the trial date, May 26th, there was no court room available and the case was continued. The fact that the case had been continued many times were not completely on the part of the plaintiff. There were several times when it was apparently her fault. But the second time it was continued the representation was made on the part of the plaintiff that they had become aware of facts and required further facts, and the matter was again apparently continued.

June 23rd, 1952, no one appeared for the plaintiff and the case dropped. In August motion to set was filed on the 26th, and the case was set for trial in September. Then the court granted a continuance to January 7, 1953; and thereafter by a letter from the United States Attorney, December 30, 1952, to the law office of Hildebrand, Bills & McLeod:

“Above matter set for trial on January 7, 1953. This matter was originally assigned to Mr. Scholtz of this office. However, Mr. Scholtz is resigning effective January 1st and this case has been assigned to me for trial, and I ask the matter be continued,” and that was the last continuance granted at the request of the Government.

Subsequent thereto, after sending notice to the law office of Hildebrand, which we never received, which Severson never received and the plaintiff never received, the matter was dropped, and we feel the order should be vacated and the plaintiff given her day in court.

Mr. Collett: If the Court please, counsel has read several times from the affidavit that was filed by myself in opposition to this motion.

There were two occasions—this last statement with regard to January 6—just checking in the file for the letter he mentioned—it was my recollection no one appeared on January 6th, and the case was dropped off calendar. But the recitation in the affidavit, the trial date was first continued at the request of Mr. Scholtz.

The Court: I have glanced at that. But what I am interested in at the moment is the power of the Court to make an order in this matter. What about

counsel's statement that a motion was made within the year?

Mr. Collett: If I might call Your Honor's attention to the rule, under Rule 60, although his motion has not recited their authority, I gathered he was relying on 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect."

That is one of the bases upon which the motion could be made. Then, "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Rule 6 says the court does not have the power to extend the time.

The Court: I am talking about, was there anything done within the year?

Mr. Collett: That is the rule. A couple of days before the year expired apparently a person representing herself as Mrs. Boling appeared in Judge Harris' court ex parte.

The Court: When was that?

Mr. Collett: That was shortly before June 3rd.

Mr. Baker: June 1st, 1954.

Mr. Collett: June 1st, counsel says. I accept his statement.

She appeared and requested—I couldn't exactly hear what she did say, and before I was aware of the motion she was making the Judge said, "You

will have to get an attorney," and something about time. He said, "I will give you a week within which to get an attorney."

Apparently she did get an attorney as I believe someone came in about the day before the expiration of that week.

Mr. Baker: That's right. Within the week motion was made for time to file an official motion.

The Court: Was that in writing?

Mr. Baker: No.

Mr. Collett: No; *ex parte*, and not in writing. The first motion in writing is the one now before the Court.

Mr. Baker: That is right.

Mr. Collett: It was a motion *ex parte* asking for extension of time.

The Court: Do both of you agree this motion was made after the informal matter of June 1st?

Mr. Collett: No, I would not agree to that.

Mr. Baker: No.

Mr. Collett: I don't think the Court entertained anything but said she should get an attorney to present whatever she had to present.

Mr. Baker: That is right. He stated she should have an attorney. But the motion was made. In fact, she asked the Court to vacate the order. Motion was set at a pre-trial conference—If we follow the letter of this rule, then certainly we would be out; but according to the spirit, the motion was made within the year.

But even if it were not made, under subdivision (6) it says any other reason justifying relief from

the operation of the judgment. Then we are told the motion shall be made within a reasonable time, etcetera. If it comes to Rule 6 there is no one-year limitation.

And she just learned of the order and came to court immediately. She had been notified by the law office of Severson, McCallum & Davis, and she appeared and made motion on her own behalf, and it seems only fair that she get her day in court, in view of the other continuances made by the Government.

I have before me a letter dated December 30, 1952, a few days before January 7th, signed by Mr. Frederick Woelflen, asking that the matter be continued, and that is why no one appeared. In view of the circumstances, it is only fair that this woman be allowed her day in court.

Mr. Collett: The only other thing I can say is that twice I've summoned witnesses for the trial of this case myself. The first time was after there wasn't a court room available. And as a result of an investigation made by the Government Mr. Woelflen requested a continuance. Then it was continued to June 30th, and no one appeared and it was dropped. Another motion to set was filed and it was set for September. And a strange thing occurred. The case was set for 10 o'clock. I appeared in Judge Roche's court ready for trial, and someone appeared for the plaintiff about a quarter of 10:00 and without—what representation was made I don't know, but the case was continued to January 6th.

I sat in court waiting for the Court to call it, and

it wasn't called, and then I found out someone appeared and the case had been continued. I learned later the reason for the continuance was that the plaintiff herself was sick and counsel didn't know where she was.

The Court: All right.

Mr. Collett: It came on the ultimate dismissal calendar in June and no one appeared.

The Court: Matter submitted?

Mr. Baker: May I make one other statement?

The Court: The matter is to be submitted. There seems to be some failure on the part of counsel on both sides to give notice to the other. However, that doesn't seem to be chargeable to the plaintiff, and in the interest of justice the motion to vacate and motion to dismiss may be granted.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Reporter's Transcript

Monday, December 27, 1954 at 9:30 a.m.

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Ralph L. Baker, Esq. For the Defendant: Lloyd H. Burke, Esq., United States Attorney, by Frederick J. Woelflen, Esq., Assistant U. S. Attorney.

The Clerk: Boling vs. United States, Motion to Dismiss.

Mr. Woelflen: May it please Your Honor, the

present motion is before the Court, which arose out of an accident, instituted under the Federal Tort Claims Act. The suit in question concerns an accident which happened on or about the 18th day of October 1950, near the entrance to the Hamilton Air Force Base, Marin County.

The plaintiff's complaint was filed on July 31, 1951. Thereafter an amended complaint was filed on November 14, 1951 and the United States answered on October 19, 1951.

I am reciting these facts from the docket to apprise Your Honor of some of the surrounding facts regarding this litigation.

On November 30, the matter was noticed to be set, and on December 10, 1951, the matter was set for trial on February 28, 1952.

On February 21, 1952, the matter was continued for trial until April 30. Thereafter, on April 20, the trial of April 30 was continued to May 26. On the 28th and 29th, the matter was continued by the Court. On the 29th the United States Government appeared in court ready to proceed to trial, at which time there was a request by plaintiff, plaintiff's counsel, that the matter go off calendar, they were not ready to proceed.

Thereafter on June 23 the matter—May 29th, 1952, the matter was continued until June 23 to be set. On June the 23rd the matter was set off calendar for lack of appearance of plaintiff's counsel to set the matter for trial.

On August 11, 1952, the matter was set for trial

and on August 26 the matter was set for trial on September 24, 1952.

If Your Honor will refer to the affidavit of Mr. Collett of our office you will notice that on the morning of the 24th of September, 1952, the Government again appeared in the court room of Judge Roche ready to proceed to trial. There was some representation made to the trial judge at that time and the matter was continued until January 1, 1953.

Between September 24, 1952 and January 1, 1953, I personally was assigned the file. Prior to that time it was handled by Mr. Scholtz and Mr. Collett. Due to the lack of staff in our office in January of 1953, which the Court will recall, I personally asked counsel that the matter be continued. They consented to a continuance, and the matter went off trial in January 1953.

Thereafter no motions were made by plaintiff or counsel to set this matter for trial at any time.

May 27, 1953 the matter came up on the Dismissal Calendar and on *January* 3, 1953, it was dismissed.

On July 2, 1954, this year, a motion was made with an attempt to vacate the dismissal of June 3, 1953. This motion was granted by Judge Hamlin on July 12th, 1954.

Now, it is the position of the Government, may it please the Court, that at least on two occasions within a period of less than two years after this accident occurred, the Government was ready, willing and able to proceed to trial. On both occasions,

because of the inability of the plaintiff, or some reason unbeknownst to the United States, the matter was put off calendar. Thereafter the matter was dismissed.

It is to be noticed in the plaintiff's affidavit to continue, or to reinstate the matter to the trial calendar, which was filed with the motion of July 2, 1954, that she states in April of 1954 she was advised by her then counsel Severson, McCallum & Davis, of the existing dismissal of June 3, 1953. However, because of some failure to meet some conditions with relation to fees between her then counsel, they desired to withdraw. Now they advised her in May of 1954, which was then the one year limitation set forth in Section 60 of the Federal Rules of Civil Procedure, of the dismissal.

The Court: That is the rule with respect to the setting aside of an order?

Mr. Woelflen: Dismissal within a year. However, nothing was done formally before this court until July 2, 1954, which was approximately 13 months after the dismissal.

Now, this motion is predicated upon the recent developments that have occurred with relation to the United States Government. The United States Government on May 29, 1952 was ready to proceed to trial on this cause. The driver of the Government vehicle, Mr. Charles Jones and government doctors who examined the plaintiff were in this area. Mr. Jones was stationed at the Hamilton Air Force Base; the doctors were likewise stationed at the Hamilton Air Force Base Hospital. For some un-

known reason the plaintiff was not ready to proceed to trial and were required again to put this matter over until September 24, 1952.

On that occasion the United States Government was once again ready to proceed to trial. It had its witnesses in the court room and the matter was continued without notice to the United States prior to the time the matter was set for trial. As far as we could ascertain some time in the morning between 9:30 and 10 o'clock—the matter was set for trial at 10 o'clock on the 24th of September, 1952,—an *ex parte* application was made to Judge Roche of this court and the matter was continued.

Thereafter military personnel, particularly the driver of the government vehicle, was discharged from the United States Army. We had him under what we call a hold under that period of time. We requested that if any transfers were to be made of any personnel that we be notified. We have since ascertained that the driver of the Government vehicle is attending a small college in Louisiana. He has been interrogated by members of the United States Attorneys office in that area and by the Federal Bureau of Investigation. He is very frank to admit, because this accident happened over four years ago, his remembrance of the facts surrounding it would not materially help the United States in defending this matter at the trial.

We likewise present to Your Honor the fact that during the initial stages of this proceeding between the time the complaint was filed in July 1951, until the matter was dismissed in June of 1953 this mat-

ter was actively investigated by the FBI. When the matter was dismissed the investigation by the FBI ceased. Since that time we have attempted to re-gather the leads that were hanging fire as a result of the dismissal. We are frank again to admit some of the witnesses, some of the sources of information that would materially help us in the defense of this matter have likewise disappeared.

Now, the Government is faced with the problem here of additional expense of developing this matter by way of medical by way of further use of the FBI and time of the members of the Department, of the Air Force and the Department of Justice.

We respectfully submit to Your Honor that the results in the present posture of this case is in no way occasioned by dilatory practices on the part of the United States Attorney's office. If we are to be accused of anything, the only thing we can be accused of is asking for a reasonable request of a continuance on January 7, 1953, which was approximately two years ago. From that time until the time of dismissal, or a lapse of approximately six months to the present time, there were no motions made, no contact made with the United States Attorney's office or to myself, who was personally handling this case, as to the availability or the willingness to the United States to go to trial at any time during that period of time.

The only thing we heard from the plaintiff was a motion to vacate the dismissal on June 3, 1953, which was made sometime around the early part of July, of this year.

Now, I realize that the Court has in its own discretion and pursuant to local rules, if there is lack of activity in a case, can dismiss the matter for lack of prosecution.

Secondly, if Your Honor is so inclined, in view of the fact that this matter was not restored on motion to vacate the dismissal of June 3, 1953, was not made until July of 1954, it is our contention that it was not timely made and therefore not within the provisions of 60(c) of the Federal Rules of Civil Procedure and therefore Your Honor, if Your Honor so desires, can vacate that order restoring the matter.

The Court: Did you present the matter in July of 1954?

Mr. Woelflen: No, I did not, Your Honor. Mr. Collett presented the matter.

The Court: You don't know whether or not the provisions of the Rule were called to the attention of Judge Hamlin?

Mr. Woelflen: I firmly believe that they were, Your Honor, because in Mr. Collett's affidavit, which was filed with the Court, there are several references to Rule 60(c) in the affidavit and I believe Mr. Collett has this affidavit in the record on file with the Court.

The Court: There is a serious question whether the Court has any power to set aside the order made after——

Mr. Woelflen: That's right, Your Honor. And in fact, in the first paragraph of our opposition to motion to vacate that "This motion is made, al-

though not so stated, under the provisions of Rule 60(b)(1) of the Federal Rules of Civil Procedure. Said Rule 60(b) further provides"—which goes on to refer to Rule 60(b) and likewise I believe in Mr. Collett's affidavit there is some reference to Rule 60(b). There is a recitation throughout the entire affidavit of the fact this matter was not made timely, and we respectfully submit that because of this turn of events the United States Government is faced with a very, very difficult task of defending a case that arises out of an accident which occurred four years ago. Likewise, we are in the position where we cannot adequately defend a matter which we were able to defend in May of 1952 and September of 1952. We respectfully submit, therefore, if it pleases this Court, this matter should be dismissed either for lack of prosecution or by Your Honor's order vacating and setting aside the order of July 12, 1954, reinstating the matter to the status as it existed on June 23, 1953, which was that of a dismissal.

The Clerk: State your appearance for the record, counsel.

Mr. Baker: Ralph L. Baker, attorney.

Your Honor, I was present in court when Mr. Collett argued this matter the last time it appeared before Judge Hamlin, and of course at that time the Rules were gone into, the matter was argued fully, and Judge Hamlin set aside or vacated the order dismissing the action.

Now, I personally feel that since the matter was argued and no appeal was taken from that order

that really counsel is without any grounds coming into this court at this time and asking that the order that we obtained vacating their order of dismissal be set aside. At that time the matter was argued and it appeared that Mrs. Boling, the plaintiff herself, had come into court within the one-year period set forth within the Rule. I don't know if Mr. Woelflen knows about that, Mr. Collett was present when Mrs. Boling came into court before Judge—I believe it was Judge Harris, and submitted the motion at that time to vacate within the year period. And that matter was argued at that time, and in fact we cited a case, *Elias vs. Pitucci*, 13 Fed. Rules Decision 13. In that case it said even one year, if the one-year limitation in Rule 60(b) applied to a motion under 55 (c) to set aside a default was complied with in spirit, where the motion was brought to the Court's attention at a pre-trial conference within the year, but wasn't filed until later.

Now, in that case——

The Court: Is there something in the record here that shows that the plaintiff appeared before Judge Harris within a year?

Mr. Baker: Mr. Collett was in Court when she did appear, and the last time he argued the matter he admitted that. In fact, I talked to Judge Harris' Clerk, and they have that in the record, that she appeared, and the Court gave her a minute order—that's correct—and the Court gave her a week, I believe, to get an attorney.

See, what happened, when I came into this case,

if Your Honor please, in June of this year, and there have been several other firms on the case, and problems had come up and it was more or less unfortunate, notice was sent out with respect to this motion for dismissal and my client received no notice of it until it was pretty close to the time of the expiration of the year. The attorney to whom this notice was sent didn't appear in court. Probably have a malpractice case against him, I don't know, but it was a kind of an unfortunate situation.

Now, this lady has a diaphragmatic hernia. I believe at one time the government was willing to settle, settling for around fifteen hundred.

The facts in the case are very simple. In fact, since we got into this case in June of this year we have taken quite a bit of action. After getting the matter reinstated Mr. Woelflen had Mrs. Boling's deposition taken. She came all the way from North Dakota. Then last month the only independent witness to this accident, his deposition was taken, I believe in Davis, California, and he is the only independent witness in the case, according to the Highway Patrol report, and I am sure Mr. Woelflen will go along with that. His deposition was taken at the United States Attorney's office, had a representative there at that deposition, and the facts, I believe, are very favorable; the liability is extremely clear-cut.

The defendant was driving a jeep, made a left turn on this 3-lane highway cutting into Hamilton Field when he was in the wrong lane, and this witness saw him, and his testimony is clear that he cut

in from the curb lane instead of the center lane without giving a signal and ran into my client. The facts are simple.

The Court: Well, that is almost four and a half years ago. It is a pretty stale case.

Mr. Baker: I beg your pardon?

The Court: I say it is a pretty stale case, and apparently this lady has had a number of lawyers, and at least the Government states in its affidavit here they cannot get ahold of the—got ahold of the driver, but after four and a half years his memory is not very clear on it any more. See, the case was once dismissed back in 1953 and that lulled the Government——

Mr. Woelflen: Into a sense of false security.

The Court: Into a false sense of security; they thought that was the end of the matter and the duty of prosecuting the action, of course, lies primarily on the plaintiff. I would be inclined to look with considerable question upon the testimony of the witnesses as to an automobile accident that happened four and a half years ago, because I just feel a degree of uncertainty and even suspicion about people who would probably with great exactness the facts upon which liability pins of what happened in an automobile accident four and a half years ago.

Mr. Baker: If Your Honor please,——

The Court: I just think so long a period of time has elapsed here that the action should really be dismissed. I am inclined to agree with you the record shows this lady appeared and did call the

matter to the Court's attention within the year period—wouldn't be any justification for vacating the order the Court previously made. But even since that time, that's six months ago, I would think that if counsel succeeds in getting a dismissal set aside back in July of this year that he would have proceeded expeditiously to bring the case up, because another six months has gone by.

Mr. Baker: That's right.

The Court: Really, it would have been on the dismissal calendar, if there had been a dismissal calendar called before this motion to set, which was filed a week ago.

Mr. Baker: But, if Your Honor please, when I got into the case there were no depositions taken by any of the people in the case. Then we had the lady come in from North Dakota several months ago, took the deposition in Mr. Collett's office. Then last month the deposition of the independent witness was taken. In fact, up until, I believe, a month or so ago we couldn't go to trial because Mr. Woelflen didn't know where his client was.

The Court: Didn't know where the driver was?

Mr. Baker: That's correct. I would have liked—in fact, my client has been after me, giving me long distance calls,—I would have liked to have the case go to trial several months ago. But because of the depositions and all that work, it was almost impossible, you might say, and especially where they didn't know—in fact, I called Mr. Woelflen several times to try to get his client and find him, and he told me he had written air mail, and he wrote again,

in fact, at the time I called him, so he has tried to find his client, I will give him credit. But I don't think we can be blamed for that.

Now, I just like to call——

The Court: Well, maybe you can, though, not you personally, but this has been going on, the complaint was filed four years ago. Four years ago the complaint was filed. The accident occurred October 18, 1950, and the complaint was filed just within the year, September 14, 1951.

Mr. Baker: Yes.

The Court: So there has been a long time elapsed. I don't think you can attach any fault whatsoever to the Government in the matter.

Mr. Baker: All right.

The Court: You can't blame them. That is a common human failing, you always want to say somebody else is the cause of troubles you bring on yourself.

Mr. Baker: Well, let me point out to the Court that this list of continuances that counsel has set forth looks very impressive, but unfortunately they don't seem to be described there, and counsel read them over. Now, as a matter of fact I think—and I would like to have this one opportunity to point out what the Government has actually done in this case.

The Government will show that four attorneys from the Government's office, United States Attorney's office, have handled this case. All right.

First of all, the matter was set for trial February 28, 1952. Why didn't it go to trial on that day?

The record shows, and I have a letter here, and in fact it appears from Mr. Collett's affidavit, that the reason it was continued was because Mr. Rudolph Scholtz quit the United States Attorney's office, and the matter was continued at that time to April 30. Let's see. Rudolph Scholz quit and Collett took over and there was a reason he couldn't go to trial, apparently, so the matter was continued to May 26. Scholtz made that motion to continue, I believe, on February 21, and I have a letter here that Mr. Hildebrand, I believe, wrote my client stating that he had just talked with Mr. Collett and Mr. Collett wasn't sure whether he would go to trial or not; he says the Assistant United States Attorney General, Mr. Rudolph Scholtz, who was going to try your case, has just quit the Government and the case has been turned over to another assistant by the name of Collett with whom I talked this morning. He was uncertain as to whether he could be ready for trial, and it seems to me that he probably has a good excuse to ask the judge to postpone the case for a couple of weeks.

Now, that case was set for April 30 to go to trial, their own attorney quit, and so the matter was continued and that was all right.

Then on April 25—it didn't go to trial on April 30 because Schlotz, so it was set over to May 26th. Then on April 25 Collett made a motion—that was when he made the motion. Then the matter was going to go to trial on May 28 and it appeared that there was no court.

So the first two or three continuances, if Your

Honor please, were—I don't want to use the word "fault", but they were on the part of the Government. They were the ones that continued the case. Then the matter came up for trial and apparently some new matter came up and the attorney wasn't prepared to go to trial, and it didn't go to trial and *he continuance* and the matter was put off calendar to be reset, and the matter was continued.

The irony of the situation, comes to the surface now, the case was finally set to go to trial on January 7th, 1953,—that is last year—the case was set to go to trial. In fact, I believe at that time everybody was getting ready to go to trial. Then what happened? Mind you, if Your Honor please, this is an extremely important point in this case. The last time this case was set for trial was last year. At that time, of course, I would think——

Mr. Woelflen: Two years ago, almost.

Mr. Baker: It was set for January 7, 1953; isn't that last year?

Mr. Woelflen: Almost two years.

Mr. Baker: Well, it's last year, isn't it? In other words, this was set for January 7, 1953, last year, if Your Honor please, to go to trial. All right. Now, certainly the Government at that time was ready to go, apparently. Then the irony comes out. Now, I have a letter before me signed by Mr. Woelflen dated December 30, 1952, about a week before this case was going to go to trial, in which he states, writing to Hildebrand:

"Gentlemen: The above matter is set for trial on January 7, 1953, in Federal Court in San Fran-

cisco. This matter was originally assigned to Mr. Doll of this office; however, Mr. Doll is resigning as an Assistant United States Attorney effective January 1, and this case has been assigned to me for trial.

“I am presently scheduled to commence a rather lengthy Federal Tort Claims trial on January 6th. As the office staff is diminished it will be impossible for anyone else to conduct the trial on January 7. Therefore, we would appreciate it if you would sign the enclosed stipulation extending time to a date that would be more convenient.”

So really the last time the case was up for trial Mr. Woelflen himself wrote the letter, and I have his signature here on this letter, in which he asks the matter be continued. That was the second time this case was continued because an attorney in the United States Attorney General's office had resigned or quit.

Now, this case has been kicked around in court since, both sides have had a number of attorneys on it. It is unfortunate. But I don't think Mrs. Boling should be blamed or that she should be deprived of her day in court. She has a diaphragmatic hernia; in fact, since I took this case over, Your Honor please, I have been indebted, and I can show you the bills if Your Honor would like to look at them, of \$255 for medical examinations that this lady has had. Now, if this case doesn't go to trial, I am going to have to pay for those. Now, I don't come in here for any sympathy, but we have tried conscientiously to prepare this case for trial,

and then here at the last minute they were the ones.

Then, within four and a half months after they did that they apparently knew the trouble she was having with these attorneys, trying to get the thing cleared up, then he went into court, at least, and some matters came up and nobody came into court in behalf of Mrs. Boling. She wasn't notified and she didn't appear, she didn't know about it.

The Court: The Clerk always sends out notices.

Mr. Baker: Her attorneys apparently got it.

The Court: That's not the obligation of the Government.

Mr. Baker: No, that may be.

The Court: Because sometimes the Government's cases are dismissed, too, for lack of prosecution.

Mr. Baker: That may be, but——

The Court: In fact, the fact that it came up in June of 1953 for dismissal was because of the fact that, according to our rules of dismissal, no procedure had been taken within the previous six-month period.

Mr. Baker: That may be.

The Court: Automatically they came up on the dismissal calendar.

Mr. Baker: That well may be, I am sorry on that point——

The Court: So really there has been, despite the fact of your statement, it was last year, there really hasn't anything happened in two years, because all of 1953 and all of 1954 is past and all that happened during that time was that on January 6, 1953, the trial went off calendar. Then the Clerk

sent out the notice on May 23, 1953, that the case would be on the dismissal calendar, and on June 3, 1953, the complaint was dismissed for lack of prosecution. Then 13 months went by and a motion was filed to vacate the order. That was granted in July of 1954.

Mr. Baker: That's right.

The Court: Now, it is pretty well getting into the third year and still all we have on now is a motion to—we were here last week or the week before on a motion to set.

Mr. Baker: That's right, we would like to set it and get the thing moving here. In fact, we have just gotten to this case for about six months and got it at least coming up for trial and had the lady examined. We are more or less set to go. I would like to really go ahead and have this case cleaned up, and it doesn't seem fair to Mrs. Boling, at least, the plaintiff here, who suffered a personal injury, that is suffering at the present time, that needs an operation, that she would be deprived of her day in court.

The Court: I don't think there is any deprivation of her day in court at all. I just think this is a stale case, counsel.

Mr. Baker: That's right, I agree there, Your Honor.

The Court: I think it has no longer any place on the calendar. I don't know what was presented to Judge Hamlin, but——

Mr. Baker: Well, now, that is another point. This thing was hashed out——

The Court: I don't know what appealing circumstance was submitted to him, but a year has gone by and apparently neither the lady nor any attorney on her behalf did anything within that period of time.

Mr. Baker: She is a traveling salesman, she travels quite a bit, that is the problem. In other words,—oh, that was another point, they sent her mail from Severson's office, but they put the wrong name on it so it didn't get to her. That was another thing that was unfortunate in this case, and you might say comes under that section of excuse or neglect, at least it was justifiable—there was justifiable cause for—I think I have the thing right here where—in other words, you can bring it up within a year if there is a mistake.

There was a mistake in her name. In other words, they tried to contact her; because they had written her name wrong it did not get to her and that was an unfortunate thing. If they were able to contact her this probably would never have occurred. That's true. That's unfortunate, but I don't believe she should be blamed for that. So within this year section, at least, and this is what we argued before Judge Hamlin—in fact, I don't know if I should have gone into all these details here about Mr. Woelfien's letter, etcetera, because we brought this out before Judge Hamlin. He saw the lady came in within one year, made the motion to vacate under this section here which she had been advised by her attorney, and Judge Hamlin, for that reason, va-

cated the dismissal, and I think that order ought to stand. They didn't appeal it——

The Court: I agree with you on that, counsel, I think that order should be vacated in view of the statement that the lady did appear, but——

Mr. Baker: And since then we have tried to try this case. I honestly have, Your Honor; I have put forth a lot of effort. There hasn't been any failure on my part to prosecute it, I have been prosecuting since I took over in June. I put forth every effort. Since Judge Hamlin put that on the calendar we have tried. And what have we done? We have written interrogatories we filed with the Government and they returned them to us. That's right. We have even done that since I have been in it. They gave us written interrogatories. I had my client sign those. So we have accomplished quite a bit. During the other years and the other attorneys, I don't cast reflection on them, but nothing has been done. Depositions have been taken, Mrs. Boling and an independent witness, written interrogatories on both sides have been done within the six months' period. If Your Honor please, I have not failed to prosecute this case, I put forth a lot of effort. I have had her examined by three doctors, Dr. Simpson, Dr. Lawrence and another doctor—three doctors—and I have been billed for those, and I feel that I have prosecuted this case.

The Court: You came into the case at the time it appeared before Judge Hamlin for the first time?

Mr. Baker: That's right. And since then I have prosecuted it very, very diligently and the record

shows we have accomplished quite a bit, and I think the order should stand, and I feel we ought to be able to put this matter on.

The Court: You probably have been diligent enough in the matter; I just think this case should have been dismissed a long time ago.

Mr. Baker: That is possible; that is possible, that is possible, but—I feel, though——

The Court: The Government has, of course, great resources at its command; yet it still is at a serious disadvantage in this case.

Mr. Baker: We do appreciate that.

The Court: Aside from one or two continuances there which——

Mr. Baker: There were about three of them, and one——

The Court: Well, they only covered a very short portion, just a period of over two or three months.

Mr. Baker: The last one was last year, January 7th, 1953.

The Court: That is two years ago.

Mr. Baker: That's right.

The Court: The Government has been placed at a serious disadvantage by this long period of time.

Mr. Baker: We are, too.

The Court: To be perfectly frank about it, if this were a private defendant I wouldn't hesitate a moment to grant a motion to dismiss because I don't think that any private litigant should be put to the disadvantage that the Government is put to in trying to meet a case as old as this.

Mr. Baker: The plaintiff, though, isn't——

The Court: The Government, however, is supposed to be able to stand up under some of these things, but it isn't right.

Mr. Baker: I appreciate that, Your Honor.

The Court: If this case should go on and if I were to try the case I think you would have to have a pretty convincing case to satisfy me that I was hearing the truth——

Mr. Baker: That may be.

The Court: ——in a case that is as old as this, or that I had sufficient wisdom to be able to evaluate the testimony with respect to an automobile——this was an automobile accident?

Mr. Baker: That is right, Your Honor.

The Court: Collision that happened four and a half years ago.

Mr. Baker: But, if Your Honor please, I don't say this to be repeating myself, but I do cast some reflection on what the defendant himself said that he doesn't remember. I am pretty sure he remembers in making that left turn without a signal from the curb lane. It is very simple; in fact, the independent witness—you see, the liability is very good in this case, and in fact they wanted to settle it at one time. And I feel he can remember that. It isn't one of these cases where you have a lot of factors involved, it is very simple. He made a left turn to go into Hamilton Field.

The Court: All right. You think there would be any possibility of making some moderate adjustment in this case?

Mr. Baker: There may be a chance to make a settlement.

Mr. Woelflen: I don't know, Your Honor. I am frank to admit that on October 7 of this year—I don't want to prolong this argument—we took the deposition of Mrs. Boling and at that time there developed certain conditions, physical conditions which she alleged or attributed as a result of this accident which we were in no way apprised of as of the time of the commencement of this action, or at the time she was originally examined.

Now, the four-year period has expired. Are these attributable to the accident? Are they attributable to other conditions? That is the position we are faced with.

The Court: I see great difficulty.

Mr. Woelflen: We cannot evaluate it in dollars and cents, because she says this is my condition, the doctors says it isn't her condition, or we can't tell, and that is what we are faced with now.

And secondly, Your Honor, there have been a lot of excuses made for the plaintiff, but this plaintiff, if she were interested in her case, she wouldn't allow a lack of contact with her attorneys go by for a period of almost 12 months with no attempt to find out what the status of her case was. If she wrote to her attorneys, she could have asked what was the status of her case, when is it coming up for trial, and she certainly would have found out it was dismissed.

The Court: I think I have heard enough. I will

give the matter some further consideration and mark it submitted.

Mr. Woelflen: Thank you, Your Honor.

[Endorsed]: Filed May 4, 1955.

[Endorsed]: No. 14727. United States Court of Appeals for the Ninth Circuit. Eva Rose Boling, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14727

EVA ROSE BOLING,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

STATEMENT OF POINTS

1. The United States District Court, Northern District of California, Southern Division, in its Orders entered and filed with the Clerk of said

Court on December 29, and December 30, 1954, and the Amendment thereto filed with said Clerk in the above named cause on January 14, 1955, was erroneous in the following respects:

(a) It was error of the court to take into its consideration the events that transpired prior to July 12, 1954;

(b) The court lacked jurisdiction to make its orders on matters that transpired prior to July 12, 1954.

(c) The court's action dismissing the cause herein was arbitrary and capricious and wholly unsupported by the facts of the case.

April 14, 1955.

/s/ NUBAR TASHJIAN,
Attorney for Plaintiff and
Appellant

[Endorsed]: Filed April 14, 1955. Paul P. O'Brien, Clerk.

